Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 204.

ROBERT J. TRACY,
PLAINTIFF IN ERROR,

v.

ALBERT A. GINZBERG, Individually and as Trustee in Bankruptcy of H. C. Long & Company.

Brief of Plaintiff in Error.

In Error to the Supreme Court of Massachusetts.

Statement of Case.

This is a bill in equity, brought in the Supreme Court of Massachusetts to follow and retake a fund alleged to have been derived from the plaintiff's property. The defendant is a trustee in bankruptcy, and the relief sought against him as such trustee is a decree establishing the plaintiff's rights to the fund.

The plaintiff, as the secretary of the Everard Breweries Company, loaned capital to the bankrupts, Long and Sanderson, and took a mortgage back on the stock and fixtures

of the dining room and bar which were purchased by Long and Sanderson. He also bought from the holder of a license the good-will and privilege of applying for a reissue of the license to sell liquors; and thereafter the plaintiff in error applied to the board of police of Boston for a transfer and reissue to him, jointly with Long and Sanderson, of the liquor licenses so purchased. This was granted by the board of police, and the license was issued in the name of the three applicants. The plaintiff paid the license tax to the city of Boston for that year, and immediately his associates, Long and Sanderson, assigned to him their interests in the licenses and covenanted not to apply for a reissue except in the names of the three so long as the debt to Everard Breweries Company was unpaid. A year later, all three applied for a reissue in the joint names, and obtained new licenses again in the names of all three. The plaintiff in error paid the license tax and again took an assignment of his associates' interests in the license and a covenant that all reissues would be applied for in the name of all three so long as the debt to Everard Breweries Company was unpaid. About three months thereafter Long and Sanderson, doing business as H. C. Long & Company, were adjudicated bankrupts, and the defendant claimed the licenses as the property of the estate. The plaintiff in error refused to assent to the jurisdiction of the referee in bankruptcy, and the district judge reversed the referee, who, nevertheless, without notice to creditors or the plaintiff in error, and on the pretext that the licenses were perishable property, authorized the trustee in bankruptcy to sell the licenses. This the defendant in error did without the knowledge or assent of the plaintiff, receiving three thousand dollars for them. The licenses were in the possession of the plaintiff, who refused to give them up, and thereafter

the board of police, without notice to the plaintiff in error, or charges or hearing, cancelled the licenses and issued new ones to the nominee of the defendant in error.

The plaintiff in error demands the three thousand dollars as derived from the sale of his property or as the damages he has suffered by the breach of the bankrupt's covenants, which were the consideration for the advancement of the various sums of money to purchase the licenses and pay the taxes. (Record, pp. 12–38.)

Jurisdiction.

At the trial before the single justice the plaintiff requested rulings which the Court declined to make as follows (Record, p. 25): —

1. That the plaintiff's right in the license issued jointly to him and to Long & Sanderson, who subsequently assigned their interest to him, was a vested property right within the meaning of article 14 of the Constitution of the United States.

2. That the police commission of the city of Boston is not a judicial body, and its acts in dealing with the plaintiff's rights do not constitute due process of law within the meaning of article 14 of the Constitution of the United States.

3. That the plaintiff's contract with Long & Sanderson for assignment of licenses, and that they should make no application for a renewal of the licenses except to themselves and Tracy, was a vested, a property right, and is protected by the Constitution of the United States, article 14.

4. That the defendant, Ginzberg, as trustee in bankruptcy, is bound by the assignments and covenants of Long

& Sanderson with relation to this license as fully as the bankrupts were.

"The Court: The first prayer the plaintiff asks — I shall not give that.

"Second: I do not see that that is material.

"Third: Well, if it is, it does not affect the question.

"Fourth: I do not think that is so."

These requests were also presented to the full bench at the hearing on appeal, being printed in plaintiff's brief as follows: —

Requests for Rulings.

The plaintiff respectfully requests the following rulings: —

1. That the plaintiff's right in the license issued jointly to him and to Long & Sanderson, who subsequently assigned their interest to him, was a vested property right within the meaning of article 14 of the Constitution of the United States.

2. That the police commission of the city of Boston is not a judicial body, and its acts in dealing with the plaintiff's rights do not constitute due process of law within the meaning of article 14 of the Constitution of the United States.

3. That the plaintiff's contract with Long & Sanderson for assignment of licenses, and that they should make no application for a renewal of the licenses except to themselves and Tracy, was a vested, a property right, and is protected by the Constitution of the United States, article 14.

4. That the defendant Ginzberg, as trustee in bank-

ruptcy, is bound by the assignments and covenants of Long & Sanderson with relation to this license as fully as the bankrupts were.

5. That if the Court shall find that the board of police of Boston acted within their powers in adopting rules denying validity to the plaintiff's contracts with Long & Company, that the law conferring such powers upon the police board is null and void under article 1, section 10, of the Constitution of the United States in that it authorizes the impairment of the obligation of contracts.

Errors Assigned. (Record, p. 39.)

The plaintiff in error, in his bill of complaint, asserted contractual rights in a license issued under authority of a law of Massachusetts and subsequent contracts with the bankrupts and their breach by the defendant in error, the representative of the bankrupts.

The plaintiff in error submits that his contract with the bankrupts that all applications for a reissue should be in the name of all the licensees until the debt to the Everard Breweries Company was paid, and the assignment to him of all of his co-licensees' interests in said license, were lawful valid contracts which the plaintiff in error, a citizen of the state of New York, had a right, privilege, and immunity to make and to have enforced in the courts of the state of Massachusetts, and he assigns this as his first assignment of error, namely, that the decision of the Massachusetts court was against such title, right, privilege, or immunity:

1. That in said suit there was drawn in question a title, right, privilege, or immunity claimed under the fourteenth amendment to the Constitution of the United States, and

the decision was against the title, right, privilege, or immunity of the plaintiff in error specially set up or claimed under said Constitution, to wit, said fourteenth article.

The plaintiff in error also submits that, as against the bankrupt's estate, his rights, privileges, and immunities were fixed by the United States bankruptcy act, and that under said act the defendant in error took no higher, other, or better title than the bankrupts retained in themselves after entering into the covenants set out in this record; and the denial by the Massachusetts court of the rights of the plaintiff in error, as established by the United States bankruptcy act, was a decision against a title, right, privilege, and immunity claimed under a statute of the United States, and is his second assignment of error:

2. That in said suit there was drawn in question a title, right, privilege, or immunity, claimed under a statute of the United States, to wit, the bankruptcy act approved July 1, 1898, and amendments thereto, and the decision was against the title, right, privilege, and immunity of the plaintiff in error specially set up and claimed under said statute.

The plaintiff in error further shows that it was admitted athe hearing in the state court that the plaintiff in error was a party to the licenses; that he was in possession of the licenses and refused to give them up; that the licenses were issued for a large and valuable consideration, and were issued under the terms of Revised Laws of Massachusetts, c. 100, secs. 17 to 20, as follows: —

Condition of Licenses.

Section 17. Each license shall be expressed, to be subject to the following conditions: —

First, That the provisions in regard to the nature of

the license, and the building in which the business may be carried on under it, shall be strictly adhered to.

Second, That spirituous or intoxicating liquor shall not be sold between the hours of eleven at night and six in the morning or on the Lord's Day; but if the licensee is also licensed as an innholder he may, between the hours of six in the morning and eleven at night on the Lord's Day, supply such liquors to guests who have resorted to his inn for food or lodging.

Third, That spirituous or intoxicating liquor shall not be sold, exchanged or delivered, or exposed, offered or kept for sale, exchange or delivery, upon the licensed premises, unless it is of good standard quality and is free from any adulteration prohibited in the Pharmacopœia of the United States or by the laws relative to adulteration of drugs and food, for either a food or a drug. If it is marked, labelled or represented as being the product of any foreign country it shall also be of the standard quality required for its legal sale for domestic use in the country of its reputed production. All such liquors which are sold exchanged or delivered, or which are exposed or kept for sale, exchange or delivery, under a license of the sixth class shall be of the quality required for their sale as drugs under the provisions of the laws relative to the adulteration of drugs and food.

Fourth, That liquor shall not be sold or delivered on the licensed premises to a person who is known to be a drunkard, to an intoxicated person, or to a person who is known to have been intoxicated within the six months last preceding, or to a minor, either for his own use, the use of his parents or of any other person, or unless upon the prescription of a duly registered physician to a person known to have been supported in whole or in part by

public charity at any time during the twelve months last preceding the date of the license.

Fifth, That there shall be no disorder, indecency, prostitution, lewdness or illegal gaming on the licensed premises or on any premises connected therewith by an interior communication.

Sixth, That the license, or a copy thereof, certified by the recording officer of the licensing board or by the clerk of the city or town by which it is issued, shall be displayed on the premises in a conspicuous position, where it can easily be read.

Seventh, That the license shall be subject to forfeiture, as herein provided, for breach of any of its conditions; and that, if the licensee is convicted of a violation of any of such conditions, his license shall thereupon become void.

Each license of the first five classes shall be subject to the further condition that the licensee shall not sell, give away or deliver on the licensed premises any intoxicating liquors on a legal holiday as defined in section 5 of chapter 8, or on any day on which a national, state, city or annual town election is held in the city or town in which the licensed premises are situated; except the day of an election in a city if such election is not required to be held in the ward in which the licensed premises are situated: but this condition shall not apply to a wholesale druggist who, on the day of an election as aforesaid, sells, gives away or delivers intoxicating liquors on the licensed premises, nor to an innkeeper who sells, gives away or delivers in his inn any intoxicating liquor to a guest who has resorted to his inn for food or lodging, but an innkeeper shall not upon such holiday sell, give away or deliver intoxicating liquor in his inn under a fourth or fifth class license.

Each license of the first three classes shall be subject to the further condition that the licensee shall hold a license as an innholder or common victualler, and that he shall not serve any spirituous or intoxicating liquor at a table or tables in any room in which the exclusive or principal business carried on is the sale of such liquors.

Each license of the first three classes issued to a common victualler shall specify the room or rooms in which such liquor shall be kept or sold, and the holder of such license shall not keep, sell or deliver any such liquors in any room or part of a building not so specified.

Each license of the second, third, fifth, or seventh class shall be subject to the further condition that no spirituous or intoxicating liquors except those the sale of which is allowed by the license shall be kept on the licensed premises.

Classes of Licenses.

Section 18. Licenses shall be of the following classes:

First Class. To sell liquors of any kind, to be drunk on the premises.

Second Class. To sell malt liquors, cider and light wines containing not more than fifteen per cent of alcohol, to be drunk on the premises.

Third Class. To sell malt liquors and cider, to be drunk on the premises.

Fourth Class. To sell liquors of any kind, not to be drunk on the premises.

Fifth Class. To sell malt liquors, cider and light wines containing not more than fifteen per cent of alcohol, not to be drunk on the premises.

Sixth Class. Licenses to retail druggists and apothecaries to sell liquors of any kind for medicinal, mechani-

cal or chemical purposes only, and to such persons only as may certify in writing for what use they want them.

Seventh Class. Licenses to dealers in paints or in chemicals to sell alcohol for mechanical, manufacturing or chemical purposes only.

Fees for Licenses.

Section 19. The fees for licenses shall be as follows: —

For a license of the first class, not less than one thousand dollars.

For a license of the second or third class, not less than two hundred and fifty dollars.

For a license of the fourth class, not less than three hundred dollars.

For a license of the fifth class, not less than one hundred and fifty dollars.

For a license of the sixth class, or seventh class, one dollar.

Section 20. If a licensee dies before the expiration of the term of his license, the city or town by which it was granted may refund to his executor or administrator a part of the license fee, proportionate to the unexpired term of the license, and a proportionate part of the percentage which has been paid to the commonwealth shall be refunded to the city or town.

Yet nevertheless, with full knowledge of the claims of the plaintiff in error, but without any charges or notice or hearing, the board of police cancelled the licenses in the possession of the plaintiff in error without any compensation for his damages. This procedure having been held by the Massachusetts court to be within the powers conferred by the aforesaid chapter 100, sections 17 to 20,

the plaintiff alleges that said sections as enforced are repugnant to the Constitution of the United States, and assigns this as his third assignment of error:

3. That in said suit there was drawn in question as enforced, the validity of a statute of the state of Massachusetts, to wit, chapter 100, Revised Laws of Massachusetts, and especially sections 17 to 20, inclusive, on the grounds of its being repugnant as enforced to article 1, sec. 10, of the Constitution of the United States and the decision was in favor of such validity of said chapter 100 and more especially of sections 17 to 20, inclusive.

The plaintiff in error submits that the board of police of Boston is a non-judicial body, and that its acts did not constitute due process of law, and that in so far as the Supreme Court of Massachusetts has made those acts the foundation of its judgment, treating them as final and unreviewable, it is a deprivation of the plaintiff of his property without due process of law. The denial of the property right of the plaintiff in error by the board of police, and the decision of the state court affirming the right of the board of police to make the decision, is assigned as error in his fourth assignment:

4. That in said bill in equity there was drawn in question the validity of an authority claimed and exercised by the board of police of the city of Boston under chapter 100, Revised Laws of Massachusetts, to determine the plaintiff's property rights on the ground that said board was not a judicial body and that its proceedings did not constitute due process of law and were repugnant to the fourteenth amendment to the constitution of the United States, and the decision was in favor of the validity of the said statute of Massachusetts and the authority exercised thereunder.

Argument.

The determination of the controversies involved in this case does not call for any review of the power of a state to regulate or prohibit callings involving, in the judgment of the legislature, public health, morals, or safety, nor yet the ministerial discretion of licensing boards to determine finally the fitness of an applicant for a license.

This case does not raise the question of a licensee's right to assign to a stranger, but the right to assign to a co-licensee who has been accepted by the board of police and found fit to exercise the trade named in the license.

In the case presented to the Court the law had been thrice acted under and the discretion of the licensing board in approving of an applicant had been exercised; the only test the law allows (Rev. Laws, Mass. c. 100, sec. 16) is the "fitness" of the person, and the person had been found "fit" in each instance.

The federal question having been seasonably raised, the first question requiring decision is the nature of the right acquired by Tracy when he became one of three grantees of the liquor license issued by the board of police December 23, 1902.

I.

What is a License?

The present use of the term "license," as an act of government, in many respects is synonymous with "franchise."

Kent defines a franchise as a privilege conferred by grant from government and vested in individuals (3 Kent Com. 458), and C.J. MARSHALL, in *Gibbons* v. *Ogden* (9 Wheat. 1, 213), thus defines a license:

> "The 4th section directs the proper officer to grant to a vessel qualified to receive it, 'a license for carry-

ing on the coasting trade;' and prescribes its form. After reciting the compliance of the applicant with the previous requisites of the law, the operative words of the instrument are, 'license is hereby granted for the said steam-boat Bellona, to be employed in carrying on the coasting trade for one year from the date hereof, and no longer.'

"These are not the words of the officer; they are the words of the legislature; and convey as explicitly the authority the act intended to give, and operate as effectually, as if they had been inserted in any other part of the act, than in the license itself.

"The word 'license' means permission or authority; and a license to do any particular thing, is a permission or authority to do that thing; and if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize. It certainly transfers to him all the right which the grantor can transfer, to do what is within the terms of the license."

It would seem, therefore, that the difference between a governmental franchise and a governmental license is one of degree and not of species, and that the same principles of law control dealings in governmental privileges, whether franchise or license when the fee exacted for the license is more than the nominal sum required to cover the cost of registration.

A license for a stated period and for a valuable consideration cannot be revoked except for breach of conditions.

Davis v. *Townsend*, 10 Barb. 333, 343.
Cook v. *Stearns*, 11 Mass. 533, 537.
Comm. v. *Moylan*, 119 Mass. 109.

It is a franchise.

State v. *C. M. & St. P. Ry.*, 56 Wis. 256, 259.
Wiggins Ferry Co. v. *E. St. Louis*, 102 Ill. 560, 576.
Hancock v. *Singer Mfg. Co.*, 62 N.J. Law, 289, 335.
Logan v. *Pyne*, 43 Iowa, 524.
Comm. v. *Standard Oil*, 101 Pa. St. 119, 145.
State v. *Schlier*, 59 Tenn. 280, 286.

The power to mortgage is co-extensive with the power to alienate, and is an incident that cannot be divorced from ownership.

Comm. v. *Smith*, 10 Allen, 448.

The only limitation upon this power is that the holder of a franchise or license for the benefit of the public cannot do anything to disqualify him from performing his public duties.

Evans v. *Boston Heating Co.*, 157 Mass. 37.

In the case at bar the evidence shows that the police board has always recognized the power of alienation and its market value, although the plaintiff does not hinge his rights upon such recognition. The rights existing and being recognized, the legislature alone could prohibit the assignment or equitable mortgaging of the privilege; the only power of the police board is to determine the fitness of the applicant for the new license in substitution for the one surrendered for cancellation. (Record, pp. 16–25.)

A license is property.

This has been determined by many courts and in many jurisdictions. "The word property is legally understood to include every class of acquisitions which a man can own or have an interest in."

In re Fixen, 102 Fed. Rep. 295, 296.
In re Emrich, 101 Fed. Rep. 231, market license.
In re Gallagher, 16 Blatch. 410 (J. BLATCHFORD).
Fisher v. *Cushman*, 103 Fed. Rep. 860, 864, 865 (C.C. A. 1st).
In re Becker, 98 Fed. Rep. 407.
In re Brodbine, 93 Fed. Rep. 643.

And other privileges are regarded as property.

In re Hurlbutt Hatch Co., 135 Fed. Rep. 504.
Hyde v. *Woods*, 94 U.S. 523, 525, (stock exchange).
Sparhawk v. *Yerkes*, 142 U.S. 1, 12.
In re Ketchum, 1 Fed. Rep. 840.
In re Warder, 10 Fed. Rep. 275.

A privilege is intangible property, and is recognized and protected as property.

Adams Ex. Co. v. *Ohio*, 166 U.S. 185, 218, 219.

The record of the United States bankruptcy court, so far as it is material, appears in the record here, and the Supreme Court of Massachusetts at *nisi prius* and in *banc* was bound to give full faith and credit to its decrees.

The bankruptcy court did not split hairs, but undertook

to administer the license as property, and ordered a sale of the license, not that the trustee should obtain money for a nomination which the bankrupts never possessed, and hence was not in any sense derived from them. These decrees, being given full faith, dispose of the refinements sought to be injected as facts to deprive the plaintiff in error of his property.

For it would seem that no reasonable answer can be framed to the plaintiff's contention that it was his property which the trustee dealt with, and from which the fund in controversy was derived.

If we accept the federal decisions that it was a property right which the bankrupts might have exercised for their own benefit, then it follows that by appropriate instruments not obnoxious to the bankruptcy act, as preferences the bankrupts might bind themselves as to any acts, not unlawful in themselves, which it was possible for them to do or perform relating to the license, and might encumber or assign any prospective income from the privilege, whether from carrying on the business or from converting it into cash at the conclusion of the business.

What could be more honest or free from taint than the transaction set out in the record?

The bankrupts lacked capital, the plaintiff in error, or the corporation whose representative he is, bought the license, had it transferred to the bankrupts and the plaintiff in error, and then paid two yearly license fees as they became due. To give it some protection the bankrupts assigned their rights to the plaintiff in error until the money was repaid, and covenanted not to apply for a reissue except in the joint names of the three, and to assign all renewals to the plaintiff in error until the money was repaid. It is admitted that the money has not been repaid.

May we not test out the fallacy of the opinion and decision of the Massachusetts Supreme Judicial Court, by considering several other contingencies that must be governed by the same principles?

Suppose that the firm of Long & Company were solvent, but that one of the partners was insolvent: would not the bankruptcy court compel the solvent firm to account for the license as property?

Suppose that one of the partners of Long & Company had died: would not the survivor be compelled to account for the firm capital in the license as well as that invested in the stock in trade?

Suppose that the partnership of Long & Company was dissolved, and one partner was to sign in liquidation: would not any equity court compel this liquidating partner to account for the proceeds of the license? Would it hold good a defence that the liquidating partner had not sold the license, but had sold only a nomination, and that the licensing board had told him it would not accept a nomination from the other partner?

The opinion of the Massachusetts Supreme Judicial Court is largely devoted to discussing a point not in controversy, that is, the power of the board of police to ignore a nomination. This is conceded, but the plaintiff in error is not seeking to control the board of police; he is seeking to recover money obtained by the trustee in bankruptcy by intermeddling and destroying the plaintiff's property by a breach of the covenants of the bankrupts.

Nor is it an answer to the plaintiff's claim on the fund to say that the police board would not listen to a nomination by the plaintiff. That issue has not been tried, and it is by no means certain that a public board may not be compelled to deal with valuable privileges upon principles of

law and equity, treating all on the same level and prohibiting them from adopting arbitrary rules denying the attributes of property to what the courts have recognized to be property. They are at liberty to apply the tests set up by the legislature. They are not entitled to penalize lawful contracts.

The Massachusetts Supreme Judicial Court does not seem to have fully determined for itself in just what position before the law the capital invested in licenses stands. Surely the several millions of capital invested in licenses in Boston is within the protection of the law.

Tehan v. *Court*, 191 Mass. 92.

II.

The Trustee's Interest.

A trustee in bankruptcy is bound by all the agreements of the bankrupt as fully as the bankrupt except as to frauds and preferences and executory contracts; and in taking over property or property rights, he takes them subject to such liens, encumbrances, or assignments as existed prior to the bankruptcy, provided they are not obnoxious as frauds or preferences.

Mitchell v. *Winslow*, 2 Story, 630 (Fed. Cas. 9,673).

Ex parte Newhall, 2 Story, 360 (Fed. Cas. 10,159).

Fletcher v. *Morey*, 2 Story, 555 (Fed. Cas. 4,864).

Windsor v. *Kendall*, 3 Story, 507 (Fed. Cas. 17,886).

Windsor v. *McClellan*, 2 Story, 492 (Fed. Cas. 17,887).

Ex parte Dalby, 1 Lowell, 431 (Fed. Cas. 3,540).
Potter v. *Coggeshall* (Fed. Cas. 11,322).
Coggeshall v. *Potter* (appeal), (Fed. Cas. 2,955).
Williamson v. *Colcord* (Fed. Cas. 17,752).

These cases have been approved and followed by the United States Supreme Court and by the courts of most of the states.

Thompson v. *Fairbanks*, 196 U.S. 516, 526.

Upon these authorities the plaintiff was entitled to the aid of a court of equity to enforce his rights against Long & Company as fully as though they had not gone into bankruptcy.

The trustee having obtained an order to sell the license secretly and without notice to the plaintiff, on the false assumption that the license was perishable property, the day after the United States district judge reversed the finding of the referee declaring the assignment to the plaintiff null and void, and having immediately sold the license and received the proceeds, the plaintiff is equally entitled to the aid of a court of equity to recover the fund derived from his property. (Record, pp. 32–38.)

It is to be noted that no decision draws the refinement of the trial justice in severing the nomination from the sale of the license; in all cases and in the case at bar the order is to sell the license, and not to nominate a successor for a consideration.

The plaintiff, upon the bankruptcy, took possession of the business and of the printed licenses, and continued the authorized business; he was actually in possession and

enjoying the privileges when the license was cancelled in March, and refused to surrender it to be cancelled when requested so to do by the police board; hence their act, no matter how they state it, was a revocation of the plaintiff's license without cause.

Equally the plaintiff had a right to contract relative to the license; not only is the privilege a property right, but the contracts founded on the loan of money and the purchase of the old license to be cancelled are property rights.

III.

A License is Property Protected by the Federal Constitution.

The Supreme Court of the United States, in *Ward* v. *Maryland* (12 Wall. 418, 430), defined the privileges and immunities of citizens under article IV, sec. 2, of the Constitution, so far as those words were applied to the case being determined, and used language apparently covering this case.

It "Protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade or business without molestation, to acquire personal property, to take and hold real estate."

In *United States* v. *Cutting* (3 Wall. 441, 443) the same Court held that the payment of the tax constituted permission for the term. "The persons on whom this tax is assessed receive what is called a license, which is the evidence of permission to exercise such trade or calling in consequence of payment of this tax or duty."

And later the Court held that, although taxation and regulation of traffic were both sought in the one license,

still the license was not a privilege alone, but also a contract for a consideration.

Gundling v. *Chicago*, 177 U.S. 183, 188, 189.

And such licenses are property.

In re Fixen, 102 Fed. Rep. 295, 296.

And, like any other contract or vested property right, are protected by the fourteenth amendment of the United States.

Scranton v. *Wheeler*, 179 U.S. 141, 155.
City Monongahela Nav. Co. v. *United States*, 148 U.S. 312.

> "The franchise is a vested right. The State has power to grant it. It may retake it, as it may take other private property for public uses, upon the payment of just compensation."

This property of the plaintiff, this equitable right of the plaintiff to have his contract as to reapplication enforced, has been taken from him, not by the United States district court, for there the order of the referee was reversed, but by the police board of Boston, who set up a rule of theirs that they will not, under certain conditions, recognize such rights, and the defendant sets up such rule as a defence to this action.

The plaintiff urges that the board of police, possessing only ministerial functions, exercising discretion, but not judicial powers, went beyond its powers when it invaded the legislative function and prescribed a rule involving anything but the fitness of the applicant, a rule as to property and not as to the person. This rule is obnoxious to the federal decisions in —

Allgeyer v. *Louisiana*, 165 U.S. 578, 589.
Yick Wo v. *Hopkins*, 118 U.S. 356.
C., B. & Q. Ry. v. *Chicago*, 166 U.S. 226, 233, 241.

It cannot have been the intent of the legislature to turn licensing over to the police board of Boston with the broad fiat to do anything they chose, and it cannot be that our courts will hold that ministerial discretion gives them a greater power than the legislature conferred. Regulations, to be constitutional, must be reasonable, and reason is not arbitrary. The licenses of Boston represent $3,000,000 to $5,000,000 of capital invested as bonuses, and the annual tax income approximates $2,000,000. Law must govern the holding and transfer of this large property and not the whim of a lay board not selected for its conspicuous knowledge of the law.

The plaintiff is not seeking to coerce the board of police in any manner; they have found a fit person who has paid $3000 to the defendant; the condition that the $3000 should be distributed to the bankrupts' creditors is a corrupt condition, beyond their powers, and void; the board had no judicial power to pass on the plaintiff's rights.

The sound discretion allowed to a state under its police powers to regulate a trade or calling does not extend to contracts not prohibited by the legislature; these must be given their full effect or the action amounts to a deprivation of property without due process of law.

Hartford Ins. Co. v. *Chicago Ry.*, 175 U.S. 91, at page 100.

When the board of police deal with a personal privilege their judgment as to the fitness of an applicant cannot be

influenced or reviewed by a court, but when they deal with a property right they cannot act arbitrarily or refuse to act within the legal lines of their duty without subjecting themselves to the judicial power.

Supervisors v. *United States*, 4 Wall. 435, 446.
(C.C.A.) *United States* v. *Cornell S. Co.*, 127 Fed. Rep. 455.

IV.

Jurisdiction of State Court.

The Massachusetts Supreme Court had complete jurisdiction.

Scott v. *Kelley*, 22 Wall. 57.
Bankruptcy Act, sec. 23, and amendments.
Kanter v. *Cohen*, 121 Fed. Rep. 984.
In re Smith, 121 Fed. Rep. 1014.
Sharpe v. *Doyle*, 102 U.S. 686.

It is immaterial whether the purchase of the license with the plaintiff's assignor's money in the name of Long & Company, raised a resulting trust, —

Smith's Eq. p. 171, —

or whether the signing of the agreements by Long & Company for a valuable consideration raised a constructive trust.

Smith's Eq. p. 179.

In either case the defendant took the same title from the bankrupts in trust for the plaintiff's benefit, and the plaintiff is entitled to affirm the wrongful sale and recover the proceeds.

Smith's Eq. p. 186.

V.
Conclusion.

The plaintiff in error submits that not only were the federal questions seasonably raised, but that, apart from the rulings requested in the state court, the record shows that the issues in the cause could not have been determined except by determining the federal questions presented, and this is sufficient to give jurisdiction.

Chapman v. *Goodnow*, 123 U.S. 540, 548.

The action of the state court in endeavoring to dispose of the plaintiff's case by a construction incorporated in a finding of fact, does not preclude consideration by this Court.

> "It is the duty of this Court to determine for itself the proper construction of the contract upon which the plaintiff relies."
>
> *Water Power Co.* v. *Street Ry. Co.*, 172 U.S. 475, 487.

First Assignment.

The right to acquire, hold, and enjoy property is guaranteed by the fundamental law.

Comm. v. *Bacon*, 13 Bush, 214.

The right of a state to make laws regulating contracts, or, in matters of police control, to prohibit contracts, is conceded, but such laws must be enacted by the legislative and not by the judicial or executive, departments. If a legislature prohibits or imposes a penalty for making a contract the courts may declare such contracts void if they so construe the legislative will. In this case there is no

pretence of a legislative act controlling the plaintiff's contracts, which therefore must be determined by the common law, and in such cases this Court decides the common law for itself.

It is submitted that, there being no legislative prohibition, the right to make the contracts was a constitutional one, and the denial of validity to them was a deprivation of a constitutional right. This federal question was fairly raised in the first and third requests for rulings.

Second Assignment.

The material portions of the bankruptcy act are as follows: —

> "Sec. 70*a*. The trustee . . . shall . . . be vested by operation of law with the title of the bankrupt, as of the date he was adjudged bankrupt, . . . (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person, . . . (5) property which . . . he could by any means have transferred."

The plaintiff in error claimed that under this law of the United States the title or right to the licenses was in him, and preferred the fourth request for a ruling, which was denied.

It is clear from the evidence of the police officials that they dealt with the defendant in error as the successor to the title to the bankrupts' property; if he had been a mere stranger he would not have been considered; if the license was not property it did not pass to the bankruptcy court or its appointee, the defendant in error; and it would seem that those principles of equity, founded on honesty, which

are the theoretical cornerstones of bankruptcy jurisprudence will not permit a ruling to stand which in effect says, "this is property within the purview of the Act so that we take its value but it is not property which the man who bought and paid for it can claim or retain any ownership in whatever." In effect it is a confiscation of the property which the plaintiff in error acquired without fraud and for more than full value. At the date of the adjudication the bankrupts' title had been assigned for full value; the bankrupts retained no power over or in it except for the benefit of the plaintiff, and they could not have transferred it by any means. An equity court would have protected the rights of the plaintiff in error.

Third and Fourth Assignments.

The record shows without dispute that although the plaintiff in error was named as one of the three co-licensees on the face of the license, and paid all the money that was paid for it, yet the board of police, without notice, without charge of any violation of the conditions of the license, at an *ex parte* hearing determined that the plaintiff in error was not an owner of it, that he had no interest in it, and in March cancelled the license issued for a large and valuable consideration which did not expire until May. Having made these decisions it also decided that the privilege of naming a successor belonged to the defendant in error as the representative of the bankrupts. The plaintiff in error requested — the second ruling — that this procedure did not constitute due process of law, and was refused, yet the Court's decision is predicated upon the acts of the board of police. The plaintiff also asked the full court to rule that such powers as had been exercised by the police board as above set out, if authorized by statute of Massa-

chusetts, were repugnant to the Constitution of the United States as authorizing the impairment of contracts.

It is submitted that the license until May 1 was a contract which the police board could not cancel except for breach of conditions.

Comm. v. *Moylan*, 119 Mass. 109.

This case does not present the question as to whether the legislature might have amended the law. It is a bare question of an executive board declared by the courts to possess under the statute the power to arbitrarily terminate a contract and retain the consideration for the entire term. The $3000 which the defendant in error received was consideration predicated on his procuring the cancellation of the plaintiff's license and the procurement of a new one. Whether or not the police board had the power to make this determination, the defendant derived the fund from a breach of the bankrupts' covenants and a destruction of plaintiff's property, the plaintiff is entitled to affirm the sale and recover the proceeds, or to ask damages. In either case the recovery would be the same, no fraud being alleged in the price obtained, but such recovery would not be subject to deductions for payments made from the fund with notice of the claims of the plaintiff in error.

It would be unprofitable to take up the time of this Court discussing the construction of the contracts which are the foundation of the plaintiff's claims, if, upon consideration, this Court determines that they are valid contracts dealing with a lawful subject matter, it would seem that the first assignment of error should be sustained, as the state court denied their validity, and denied that any enforceable or protected property rights existed in them.

Equally, if they are valid contracts and not obnoxious as frauds or preferences under the bankruptcy act, the plaintiff is entitled to enforce them against the defendant, and the second assignment of error, apparently, should be sustained.

It seems to follow, too, that the power under Massachusetts law ascribed by the state court to the police board, to determine mixed questions of law and fact without appeal or review by the courts, and thereupon to forfeit and confiscate the plaintiff's rights without compensation, is a power repugnant to the United States Constitution, and the third and fourth assignments of error should be sustained.

The plaintiff in error has not felt clear whether a decree should run against the defendant as trustee in bankruptcy or as an individual. The defendant has assumed to act as a trustee and under protection of a referee's orders, but the record discloses (Exhibits 18, 19, pp. 33–38) a proceeding instituted by the defendant in error before a referee, and a denial of jurisdiction by the plaintiff in error. Nevertheless, on February 12, 1904, the referee assumed jurisdiction and made an order (Exhibit 20) from which a review was claimed (Exhibit 21) by the plaintiff in error. On the 28th day of March, 1904, the district judge reversed the referee with leave to amend pleadings and introduce further testimony. The referee had held that Tracy had no rights in the license. This was reversed (Exhibit 22); yet on a petition by the defendant in error on March 29, 1904, the referee, without further pleadings or evidence, or any notice, made the order of sale under which the defendant in error claims to have acted. (Exhibits 24, 25.) Whether this wilful action of the referee and defendant in error, in defiance of the decree of the district judge,

was such a contempt as made them liable personally rather than officially does not seem to be settled by any decision of a federal court. Both are bonded officers of the district court.

To conclude, the plaintiff submits that the Long & Company contracts conferred property rights that are protected by the United States Constitution; that the bankruptcy of Long & Company did not avoid them; that the defendant took no title to the license other than that of the bankrupts and subject to their contracts relating to it; that the defendant by his wrongful acts has put an end to the license and to all values founded thereon, and received for those acts $3000, which sum is charged with a resulting or constructive trust for the plaintiff's benefit, and the plaintiff is entitled to recover that sum from the defendant without any deduction.

Respectfully submitted,

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